but solely from his own voluntary retention of his property. Hence it seems that while the legal judgment, without reference to the New York rule of damages, was properly rendered, circumstances occurring prior to its rendition yet too late to be pleadable in that action, disentitled the vendor to substantial damages unless on the somewhat violent assumption that title to the growing hops was meant to pass without delivery. The consequent impropriety of enforcing a substantial judgment is obvious. Therefore in spite of the vendor's apparent good faith the injunction should have issued.[20] For if damages in contract actions are designed to recompense the plaintiff for his actual injury, it is clearly inequitable to permit their recovery where by rule of law no injury has been caused by the breach.

RAILWAY RIGHTS IN CITY STREETS UNDER STATE FRANCHISES.—The rights of railway companies in the streets of a city, which according to the better view are to be considered franchises,[1] have been variously described as easements,[2] licenses,[3] and contracts.[4] The confusion of such an interest with a license[5] results from the similarity between the two, which is especially apparent in a jurisdiction where the operation of a street railway is recognized as an ordinary street use and thus as within the regulatory power of the municipality.[6] On the other hand, the right resembles an easement in gross in its character of a right of way[7] which has been created for the benefit of an individual rather than for that of a dominant estate, and, from its origin in an agreement between the State and the grantee, assumes the peculiarities of a contract[8] and hence is within the protection of the Federal Constitution.[9] It differs, however, both in its origin and in its legal characteristics from either a license, an easement, or a

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[20]Equity has frequently enjoined a judgment when a subsequent change of conditions renders its enforcement unconscionable. N. Y. & Harlem R. R. Co. *v.* Haws (1874) 56 N. Y. 175; Walker *v.* Heller (1883) 90 Ind. 198; Bassett *v.* Henry (1889) 34 Mo. App. 548.

[1]Blair *v.* Chicago (1905) 201 U. S. 400; People *v.* O'Brien (1888) 111 N. Y. 1; Fanning *v.* Osborne (1886) 102 N. Y. 441; *cf.* Hatfield *v.* Strauss (1907) 189 N. Y. 208.

[2]Mayor, etc., of Knoxville *v.* Africa (1896) 77 Fed. 501; Railroad Co. *v.* Town of Alston (1904) 54 W. Va. 597.

[3]Mayor, etc., of the City of Troy *v.* Troy & Lansingburgh R. R. Co. (1872) 49 N. Y. 657.

[4]See Mayor, etc., of New York *v.* Second Ave. R. R. Co. (1865) 32 N. Y. 261; City of Binghamton *v.* B. & P. D. Ry. Co. (N. Y. 1891) 61 Hun. 479.

[5]See Union Traction Co. *v.* Chicago (1902) 199 Ill. 484.

[6]C. B. & Q. R. R. Co. *v.* Street R. R. Co. (1895) 156 Ill. 355.

[7]See People *v.* O'Brien *supra;* Milhau *v.* Sharp (1863) 27 N. Y. 611; Citizens Street Ry. Co. *v.* Common Council (1901) 125 Mich. 673.

[8]Brooklyn Central R. R. Co. *v.* The Brooklyn City R. R. Co. (N. Y. 1860) 32 Barb. 358; 7 COLUMBIA LAW REVIEW 414; *cf.* Lorain Steel Co. *v.* Norfolk, etc. Street Ry. (1905) 187 Mass. 500.

[9]Wilmington R. R. Co. *v.* Reid (1871) 13 Wall. 264; Mayor, etc., of New York *v.* Second Ave. R. R. Co. *supra;* City of Binghamton *v.* B. & P. D. Ry. Co. *supra.*

contract.[10] Thus a license is not taxable as property[11] and an easement in gross is not assignable,[12] whereas the street rights of a railway company are both taxable[13] and assignable.[14] The distinction between such a franchise, which is considered to be an incorporeal hereditament,[15] and a contract, which is merely a chose in action whatever its subject matter may be,[16] is apparent. Furthermore the latter requires for its formation only the exercise of that volition common to all rational beings[17] and an easement may be created only by the proprietary power,[18] but the right to use the public highway for profit arising from the collection of tolls is derivable from the sovereignty alone[19] and is thus clearly distinguishable from a license, which has its source in the police power.[20] Moreover while a license allows the exercise of a privilege which is of common right but which has been forbidden under the police power,[21] and, like a franchise, is a permission by the State to do something which otherwise could not lawfully be done,[22] a franchise, on the other hand, is a grant of a privilege tinged with a public interest[23] to do what could be done as of common right.[24]

As such a grant is in derogation of public right, it is to be strictly construed in favor of the State,[25] and although a franchise permitting the use of the highway for a street railway has been construed to be in perpetuity in the absence of limiting words,[26] the test of its duration is primarily the intention of the grantor,[27] and where the use may become inconsistent with the public purposes for which the city holds the streets, the conveyance of a perpetual right is not to be presumed unless such an intention clearly appears from the grant itself.[28] The importance of a strict interpretation of the grant is further apparent in view of the well settled rule that the construction, maintenance, and

[10] 4 COLUMBIA LAW REVIEW 428.

[11] People *ex rel.* Einsfeld *v.* Murray (1896) 149 N. Y. 367; see Simmons *v.* The State (1848) 12 Mo. 268.

[12] 7 COLUMBIA LAW REVIEW 536.

[13] People *ex rel.* Met. St. Ry. Co. *v.* Tax Com'rs. (1903) 174 N. Y. 417; *cf.* 9 COLUMBIA LAW REVIEW 160.

[14] Parker *v.* Elmira, C. & M. R. R. Co. (1901) 165 N. Y. 274.

[15] 2 Bl. Com. *21; Queen *v.* Cambrian Ry. Co. (1871) L. R. 6 Q. B. 422.

[16] Anson, Contracts (Huffcut, 11th ed.) 290 note.

[17] Wald's Pollock, Contracts (Williston, 3rd ed.) 58, 59.

[18] Tiffany, Real Property 700.

[19] Milhau *v.* Sharp *supra;* San Francisco *v.* S. V. W. W. Co. (1874) 48 Cal. 493; Port of Mobile *v.* L. & N. R. R. Co. (1887) 84 Ala. 115.

[20] People *ex rel.* Einsfeld *v.* Murray *supra;* Tenney *v.* Lenz (1863) 16 Wis. 589.

[21] Tiedeman, Lim. Police Power § 101.

[22] 7 COLUMBIA LAW REVIEW 414.

[23] See Pierce *v.* Emery (1856) 32 N. H. 484; Central Transportation Co. *v.* Pullman's Palace Car Co. (1890) 139 U. S. 24.

[24] See C. & W. I. R. R. Co. *v.* Dunbar (1880) 95 Ill. 571.

[25] The Matter of City of Brooklyn (1894) 143 N. Y. 596; Syracuse Water Co. *v.* City of Syracuse (1889) 116 N. Y. 167; Blair *v.* Chicago *supra.*

[26] People *v.* O'Brien *supra;* Milhau *v.* Sharp *supra.*

[27] Syracuse Water Co. *v.* City of Syracuse *supra.*

[28] See Dillon, Municipal Corporations (4th ed.) 722.

operation of a railway in the streets of a city without legal authorization is a public nuisance.[29] As such it may be enjoined at the suit of an individual who will sustain an injury not common to the public,[30] or at the suit of the people through their proper representative.[31] Moreover, since the city is charged with the duty of maintaining the streets free from obstructions and encroachments,[32] it may abate a public nuisance either summarily[33] or by suit in its representative capacity.[34] Although the right of the city to maintain such an action when a franchise has been granted by the State is properly denied,[35] because only the sovereign may question the exercise of a right which it has itself created, and the validity of a franchise will not be determined when no actual property right is threatened with invasion,[36] it would seem that if a franchise had not in fact been granted, or if it had expired, the city would not be in a different situation from that which would arise in the case of any other obstruction in the street.[37]

A problem requiring the application of these principles was recently presented in the case of *N. Y. C. & H. R. R. R. Co.* v. *The City of New York* (1911) 127 N. Y. Supp. 513. The Hudson River R. R. Co., which had been organized in 1846 for a fifty year term,[38] obtained the right from the State to lay its tracks in certain streets in New York City. In 1869, the plaintiff company was formed through the consolidation of the Hudson River Company with the New York Central Company by virtue of the statutory law,[39] which provided that all the franchises of each of the corporations should be deemed to be vested in the new company. The City having ordered the tracks of the plaintiff to be removed on the theory that they had become a public nuisance because of the expiration of the fifty year term, the court enjoined the execution of the order on the ground that the State alone could question the exercise of the franchise. Assuming with the court that the original grant was limited to the period of corporate existence, the plaintiff's authorization to use the streets was dependent

[29]Mayor, etc., of Knoxville *v.* Africa *supra;* see Pittsburg, C. & St. L. Ry. Co. *v.* Hood (1899) 94 Fed. 618; Davis *v.* Mayor, etc., of New York (1856) 14 N. Y. 506.

[30]Fanning *v.* Osborne *supra;* Milhau *v.* Sharp *supra;* Manton *v.* South Shore T. Co. (N. Y. 1907) 121 App. Div. 410.

[31]See 42nd St., etc., R. R. Co. *v.* 34th St. R. R. Co. (N. Y. 1885) 20 J. & S. 252; Fanning *v.* Osborne *supra.*

[32]Greater New York Charter (3rd ed. 1906) § 50; Hume *v.* Mayor (1878) 74 N. Y. 264; Cohen *v.* The Mayor, etc., of New York (1889) 113 N. Y. 532.

[33]D. L. & W. R. R. Co. *v.* The City of Buffalo (N. Y. 1896) 4 App. Div. 562, aff'd. 158 N. Y. 266; Brooklyn Steam Transit Co. *v.* City of Brooklyn (1879) 78 N. Y. 524.

[34]City of New York *v.* De Peyster (N. Y. 1907) 120 App. Div. 762, aff'd 190 N. Y. 547; City of New York *v.* Knickerbocker Trust Co. (N. Y. 1905) 104 App. Div. 223; Burlington *v.* Pennsylvania R. R. Co. (1897) 56 N. J. Eq. 259; City of Jacksonville *v.* Jacksonville Ry. Co. (1873) 67 Ill. 540; see City of Cohoes *v.* D. & H. Co. (1892) 134 N. Y. 397; Easton & Amboy R. R. Co. *v.* Inhabitants of Greenwich (1874) 25 N. J. Eq. 565.

[35]See City of New York *v.* Bryan (1909) 196 N. Y. 158.

[36]City of New York *v.* Bryan *supra.*

[37]See City of New York *v.* Bryan *supra.*

[38]L. of 1846, c. 216.

[39]L. of 1869, c. 917.

upon the grant of a long term franchise under the law of 1869. As that statute neither expressly nor by necessary implication purported to create any new rights in the streets but merely conferred on the consolidated company the pre-existing rights of its constituents, it would seem that, unless an extension of the franchise is inferable from the prolongation of the existence of the corporation, the rule of strict construction would lead to the conclusion that the plaintiff was without right in the city streets. In that event, it is submitted that the city's right to abate the tracks as a nuisance should be recognized and that the principal ground for the decision may well be questioned. Nevertheless, were the duration of the grant measurable by the life of the consolidated company, the force of the suggestion of the concurring opinion that the point in issue would be determinable only by a consideration of the status of a *de facto* corporation and that therefore the city had over-stepped its authority, must be conceded.

CRIMINAL ENFORCEMENT OF CONTRACTS FOR LABOR AS "INVOLUNTARY SERVITUDE."—Although at the time of its adoption the Thirteenth Amendment to the Federal Constitution was primarily directed against that type of slavery to which in this country the term was exclusively applied, it was early recognized by the Supreme Court that the expression "involuntary servitude" as used therein was sufficiently broad to include such kindred forms as the Chinese coolie system and Mexican peonage.[1] The latter indeed, whenever subsequently brought under judicial consideration, has accordingly been held to fall within the prohibition of the Amendment.[2] Still another type is illustrated in a series of statutes enacted in certain of the Southern States for the purpose of making productive irresponsible labor, all of which in one form or another imposed a criminal penalty upon the breach of a labor contract. Thus one Act penalized the breach alone;[3] a second was intended to prevent the laborer who had abandoned one master from making a contract for similar service with a different employer,[4] and still another declared it a crime for a laborer to break his contract without repaying such advances as he might have received.[5] Each of these enactments was in turn declared unconstitutional upon the ground that, viewed with reference to their practical results, they opened the door for the creation and maintenance of a system of servitude as truly involuntary as peonage itself, and equally within the scope of the Thirteenth Amendment and of the congressional legislation enacted in pursuance thereof.[6] These decisions may clearly be justified upon the ground that while the sanction of mere civil liability to compensate in damages for breach of the contract cannot be regarded as compulsion, yet to intrust to the master the powerful weapon of the criminal law would render the laborer's service in a

[1]Slaughter House Cases (1872) 16 Wall. 36, 68; *In re* Turner (1867) 1 Abb. (U. S.) 84.

[2]Peonage Cases (1903) 123 Fed. 671; Peonage Cases (1905) 136 Fed. 707; *In re* Peonage (1905) 138 Fed. 686.

[3]*Ex parte* Hollman (1908) 79 S. C. 9, overruling State *v.* Williams (1889) 32 S. C. 125.

[4]Peonage Cases (1903) 123 Fed. 671; Toney *v.* State (1904) 141 Ala. 120.

[5]State *v.* Murray (1906) 116 La. 655; *Ex parte* Drayton (1907) 153 Fed. 986; State *v.* Williams (1909) 150 N. C. 802.

[6]*Ex parte* Hollman *supra;* see also cases cited in notes 3, 4, and 5 *supra.*